ORIGINAL 91-7051

No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANA FEIJOO TOMALA,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the conscious avoidance charge approved by the Second Circuit, which permits a jury to convict when the evidence would have alerted a reasonable person to the unlawfulness of her conduct, unconstitutionally reduced the government's statutory burden to prove petitioner's knowledge that she was transporting illegal drugs.

2. Whether the court's precipitate declaration of a mistrial after the jury had deliberated for only one afternoon violated petitioner's right under the Double Jeopardy clause to have her trial "completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497, 503 & n. 11 (1978).

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OTHER AUTHORITIES

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Ana Feijoo Tomala respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit that affirmed a judgment of the United States District Court for the Eastern District of New York dated March 6, 1991, convicting her of importation of cocaine, 21 U.S.C. § 952(a), 960(b)(2)(B)(ii) and 18 U.S.C. § 3551 et seq., and sentencing her to five years of imprisonment to be followed by four years of supervised release.

OPINION BELOW

The Court of Appeals rendered an unpublished opinion affirming petitioner's sentence on September 27, 1991, which is annexed as Appendix A. The Court of Appeals denied petitioner's petition for rehearing on November 4, 1991. The order denying rehearing is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1991. See Appendix A. No application has been filed for an extension of time within which to file this petition. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Due Process Clause of the Fifth Amendment:

> [N]or deprived of life, liberty, or property, without due process of law.

Double Jeopardy Clause of the Fifth Amendment:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

The Facts Relevant to Conscious Avoidance

The government's case against petitioner consisted of proof that a suitcase containing dresses that she brought into the United States had cocaine secreted in it. Since the cocaine was hidden in the sides of the suitcase, the critical issue was whether petitioner had knowledge of its presence. At trial, the government argued that petitioner had actual knowledge that the suitcase contained cocaine, not that she consciously avoided learning that cocaine was in the suitcase. The government never offered any evidence that petitioner was promised or received money for taking the suitcase, or that the cocaine was visible to anyone making a cursory examination of the suitcase's contents.

The defense case was that petitioner was an innocent dupe, who had looked in the suitcase and seen only that it contained dresses, and that she had accepted the suitcase in accordance with Ecuadorian custom which dictated that favors of this kind be done even for a stranger. Petitioner testified that she had

looked hastily at the telephone number and address she had been given for the person she was supposed to deliver the suitcase to in New York, which was why she had not noticed that the information was incomplete. Moreover, when petitioner was stopped at the airport, she exclaimed "Damn it, wny did I bring it for this woman. This woman gave it to me in the airport in Ecuador."

Not only was a conscious avoidance instruction not factually warranted but the charge given improperly created a presumption of guilt. The charge did not state that before finding conscious avoidance the jury had to find that petitioner had purposely avoided leaning the truth about the presence of drugs in the suitcase. Instead, it stated:

> ...[I]t is not necessary for the government to prove to an absolute certainty that the defendant knew that she possessed narcotics. The defendant's knowledge may be established by proof beyond a reasonable doubt that the defendant was aware...of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that the defendant actually believed that the suitcase did not contain narcotics.

Petitioner argued that the charge was erroneous in that it failed to inform the jury that Feijoo had to have deliberately closed her eyes to the truth about the contents of the suitcase in order for the jury to conclude that the government had met its burden of proving conscious avoidance.

The Facts Relevant to Double Jeopardy

Two trials were held in this case, and petitioner argued on appeal that the second trial should not have been held because the first trial was aborted by the judge over the defendant's (and the government's) objection and without "manifest necessity" for a mistrial.

After a two-and-a-half day trial, jury deliberations began at approximately 12:30 P.M. Thereafter, the jury sent out notes at 4:05 P.M. and 5 P.M. stating that it did not think it could reach a decision. However, a 5:45 P.M. note, which was seized upon by the court to declare a mistrial, stated only that the jury had not as of that moment reached a unanimous verdict (and gave no indication that the jury expected or wished to be discharged).

The first note (at 4:05 P.M.) was immediately followed by a note requesting that a portion of one government witness' testimony be re-read, indicating that the jury was hardly at a critical impasse at that time. The court responded to the second note by telling the jury that it had not spent enough time deliberating and suggesting that it might return after the weekend to resume deliberations. At 5:45 P.M. the jury sent out a note that it had not reached a decision and that one juror had to leave for religious observance at 6 P.M. Over both defense and

government opposition,[1] the court announced that it would declare a mistrial, and then questioned the jury foreman about whether further deliberations would be productive (the foreman reported that some jurors felt that resuming deliberations after the weekend might produce a verdict).

The Second Circuit's Opinion

With respect to conscious avoidance, the Court held that it was appropriate for the court to give such a charge. The panel stated that such a charge is appropriate "when the evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct." Noting that petitioner acknowledged that she had accepted a suitcase from a stranger to bring to the United States "without further intelligible instructions" the panel concluded that the conscious avoidance charge was warranted. The Court did not address petitioner's claim that the charge given by the district court was improperly formulated.

With respect to petitioner's double jeopardy argument, the Second Circuit held that the second trial was not barred on double jeopardy grounds because the district court's declaration of a mistrial came after it had given an Allen charge and after the jury had announced that it was hopelessly deadlocked.

[1] The prosecutor stated: "I would [join] in [defense counsel's] request that they be asked to come back and try again, if not tomorrow, then Monday."

REASONS FOR GRANTING THE WRIT

POINT I: THE SECOND CIRCUIT'S APPROVAL OF A "CONSCIOUS AVOIDANCE" INSTRUCTION AT PETITIONER'S TRIAL FOR NARCOTICS TRAFFICKING RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THERE IS A CONFLICT AMONG THE CIRCUITS.

In affirming petitioner's conviction for drug importation, the Second Circuit approved of the district court's "conscious avoidance" instruction. In doing so, the court reduced the conscious avoidance standard to, at most, recklessness, vitiating the statutory requirement that the government prove petitioner acted knowingly in importing drugs.[2] This instruction, as well as conscious avoidance instructions approved by the Second Circuit in recent reported decisions, see pp. 12-13, infra, is inconsistent with the law of other circuits. The Court should grant this writ to resolve the conflict among the circuits and to

[2] The statute under which petitioner was convicted, 21 U.S.C. § 960 (a), provides:

> "(a) Any person who --
>
> (1) contrary to section 952, 953 or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
>
> *****
>
> shall be punished as provided in subsection (b) of this section."

answer the previously unaddressed question[3] of whether a statutory requirement of knowledge may be satisfied by a showing of conscious avoidance, and if so what that showing must include.

Introduction

One form or another of conscious avoidance instruction has been approved in each of the circuits.[4] The instruction is meant to allow the jury to "impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps." United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986) (emphasis added). In perhaps the most widely cited analysis of conscious avoidance, United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc), cert. denied, 426 U.S. 951 (1976), the Ninth Circuit concluded that conscious avoidance requires that the defendant's ignorance be "solely and entirely a result of... a conscious purpose to avoid learning the truth." Id. at 704. This ignorance must result from "a calculated effort to avoid sanctions of the statute while violating its substance." Ibid. See also United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (the government must "present evidence that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of subsequent prosecution"). A finding of conscious avoidance is appropriate only where "it can almost be said that the defendant actually knew." United States v. Jewell, 532 F.2d at 704 (quoting G. Williams, Criminal Law: The General Part, §57 at 159 (2d ed. 1961)).

The Instruction Given was Factually Unwarranted and Improperly Formulated

In this case, a conscious avoidance charge was neither factually warranted nor properly formulated. The government did not argue its case on a conscious avoidance theory, nor did it produce evidence that petitioner consciously refused to learn the facts regarding the cocaine contained in the suitcase, a prerequisite for a conscious avoidance charge. Contrary to the panel's conclusion, that petitioner accepted the suitcase from a stranger "without further intelligible instructions" may evidence carelessness, but does not show that petitioner deliberately sought to avoid knowing that there were drugs in the suitcase.

Moreover, the district court's instruction made no reference to the requirement that the jury find petitioner had purposely

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[3] In two cases this Court has touched on the related issue of when knowledge can be inferred from circumstances. Turner v. United States, 396 U.S. 398, 416 n.29 (1970) (adopting proposed Model Penal Code definition of knowledge to infer defendant's knowledge that heroin he sold was imported); Leary v. United States, 395 U.S. 6, 46 n.93 (1969) (adopting proposed Model Penal Code definition of knowledge to negate inference of defendant's knowledge that marihuana he possessed was imported).

[4] The significance of the issue raised by this petition is reflected in a Westlaw search which shows that since 1970 there have been over one hundred reported circuit court decisions involving challenges to the application or formulation of conscious avoidance charges.

avoided knowing about the cocaine. The Second Circuit's approval of the instruction without this requirement drastically diminishes the showing the government is required to make to prove conscious avoidance. In so doing, it violates petitioner's constitutional right to have the government carry the burden of proving beyond a reasonable doubt that she knowingly transported narcotics. In re Winship, 397 U.S. 358, 364 (1970).

Having approved a conscious avoidance charge that equated knowledge with recklessness, the panel went even further, and approved the giving of a conscious avoidance charge whenever "evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct." By approving the instruction when the evidence points only to negligence, the Second Circuit invites the jury to convict not on a finding of knowledge or even recklessness, both of which require awareness by the defendant, but on a finding "that the defendant should have known his conduct was illegal." United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) (emphasis in original). Yet "true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge." United States v. Jewell, 532 F.2d at 707 (9th Cir. 1976) (Kennedy, J., dissenting). For this reason, a conviction based on conscious avoidance requires that "the defendant had subjective knowledge of his criminal behavior," i.e., that his "ignorance of an operant fact was deliberate."

United States v. de Francisco-Lopez, 939 F.2d 1405, 1409-10 (10th Cir. 1991) (emphasis added). To hold otherwise, as the Second Circuit panel did in this case, in effect creates "a presumption of guilt." United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977).

The Conflict Among the Circuits

The Second Circuit's recent holdings on the content and the circumstances justifying a conscious avoidance instruction conflict with the law of other circuits.

In accordance with this Court's holdings in Leary and Turner (see n.4), each circuit has incorporated into its definition of conscious avoidance the Model Penal Code definition of knowledge -- that knowledge of a fact is established "if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."[5] Except for the Second Circuit, whose most recent pronouncements have omitted this require-

[5] Model Penal Code, §2.02(7) (Official Draft and Revised Comments 1985). See, e.g., United States v. Picciandra, 788 F.2d 39 (1st Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Lanza, 790 F.2d 1015 (2d Cir. 1986); United States v. Caminos, 770 F.2d 361 (3d Cir. 1985); United States v. Martin, 773 F.2d 579 (4th Cir. 1985); United States v. Restrepo-Granda, 575 F.2d 524 (5th Cir.), cert. denied, 439 U.S. 935 (1978); U.S. v. Thomas, 484 F.2d 909 (6th Cir.), cert. denied, 414 U.S. 912 (1973); United States v. Moser, 509 F.2d 1089 (7th Cir. 1975); United States v. Cooperative Grain and Supply Co., 476 F.2d 47 (8th Cir. 1973); United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991).

ment, all the circuits have added to this two-part definition a third component: that the defendant acted deliberately, willfully or purposefully to avoid learning the truth. It is this third element that sets conscious avoidance apart from reckless disregard for the truth.

The Second Circuit's recent decisions on conscious avoidance have rejected the deliberateness test outlined in Jewell and in its own prior decisions.[6] Thus, in United States v. Feroz, 848 F.2d 359, 360 (2d Cir. 1988), the Second Circuit approved a conscious avoidance instruction consisting only of the Model Penal Code definition of knowledge: "knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist." See also United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990).

The Second Circuit's approval of the instruction without the

[6] The Second Circuit has on prior occasions adopted some form of the Jewell deliberateness test for conscious avoidance. See, e.g., United States v. Guzman, 754 F.2d 482, 488 (2d Cir. 1985) (conscious avoidance requires finding that defendant "deliberately refused to learn the specific facts"); United States v. Aulet, 618 F.2d 182, 191 (2d Cir. 1980) (conscious avoidance charge must include reference to "purposeful avoidance of the truth"). The Aulet - Guzman deliberateness requirement has been overruled sub-silentio by the Second Circuit's decisions in United States v. Feroz, 848 F.2d 359, 360 (2d Cir. 1988) and United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990).

Jewell deliberateness test sets it apart from other circuits. See, e.g., United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986) (conscious avoidance charge appropriate only where "the facts suggest a conscious course of deliberate ignorance"); United States v. Caminos, 770 F.2d 361 (3d Cir. 1985) (approving conscious avoidance charge requiring jury to find that "defendant deliberately closed his eyes to what otherwise would have been obvious to him"); United States v. Martin, 773 F.2d 579, 584 (4th Cir. 1985) (approving conscious avoidance instruction requiring finding of "conscious purpose" and "deliberate closing of the eyes"); United States v. Chen, 913 F.2d 183, 190-91 (5th Cir. 1990) (conscious avoidance occurs "only where it can almost be said that the defendant actually knew"); United States v. Gullett, 713 F.2d 1203, 1212 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984) (conscious avoidance instruction designed to prevent defendant "from escaping conviction merely by deliberately closing his eyes" to the truth); United States v. Nazon, 940 F.2d 255, 258 (7th Cir. 1991) (approving conscious avoidance instruction requiring finding that defendant "shut his eyes for fear of what he would learn"); United States v. Bussey, 942 F.2d 1241, 1246 (8th Cir. 1991) (conscious avoidance occurs only where defendant had "a conscious purpose to avoid enlightenment"); United States v. Alvarado, 838 F.2d 311, 314 (9th Cir. 1987), cert. denied, 487 U. S. 1222 (1988) (instruction warranted only where defendant purposely "contrived to avoid learning all of the

facts in order to have a defense in the event of a subsequent prosecution"); United States v. de Francisco-Lopez, 939 F.2d at 1409 (10th Cir., 1991) (defendant's acts to avoid truth must be "deliberate and not equivocal"); United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir. 1991) (defendant must have "purposely contrived" to avoid learning the truth); United States v. Jack, 890 F.2d 1250 (D.C. Cir. 1989) (conscious avoidance instruction warranted only where defendant "deliberately failed to investigate the matter in order to remain ignorant of the truth").

Not only does the Second Circuit not require that a conscious avoidance charge incorporate the notion that the defendant deliberately and purposefully shut her eyes to the truth, but the Second Circuit's approach conflicts in another way with that of the Fifth, Ninth, Seventh and Eleventh Circuits. These Circuits require the presence of facts indicating deliberate ignorance before a conscious avoidance charge may be given. United States v. Batencort, 592 F.2d 916, 918 (5th Cir. 1979); United States v. Lennartz, 948 F.2d 363, 368-69 (7th Cir. 1991); United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991). The Second Circuit, however, requires merely that the "surrounding circumstances" be such that "reasonable persons could have concluded that the circumstances alone should have apprised defendant[] of the unlawful nature of [her] conduct." United States v. Mang Sun Wong, 884 F.2d at 1541. Indeed, the Second Circuit has acknowledged that it and the Ninth Circuit, at least, "arguably have different views concerning use of the 'conscious avoidance' charge." Mang Sun Wong, 884 F.2d at 1542 n.5. In Mang Sun Wong, the Second Circuit contrasted its view with United States v. Alvarado, 838 F.2d at 314, in which the Ninth Circuit observed that "cases in which the facts point to deliberate ignorance are relatively rare."

The Instruction Encroached on the Legislature's Domain

Moreover, the charge approved by the Second Circuit impermissibly encroached on the domain of the legislature. See Morissette v. United States, 342 U.S. 246, 263 (1952); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 93, 95-96 (1820). By focusing exclusively on petitioner's alleged awareness that there was a "high probability" that the suitcase contained narcotics, the approved instruction reduced the conscious avoidance standard to one of at most recklessness: it required the jury to find only that petitioner was aware of a high probability that the suitcase contained drugs, and that she recklessly transported the suitcase without investigating further. Yet recklessness is a distinctly lower standard for the government to meet than the statutory requirement of knowledge. In approving the conscious avoidance instruction used here, the Second Circuit has run afoul of the "spirit of the doctrine which denies to the federal judiciary power to create crimes," which also admonishes the courts not to "enlarge the reach of enacted crimes by consti-

tuting them from anything less than the incriminating components contemplated by the words used in the statute." Morissette v. United States, 342 U.S. at 263. See also Robbins, "The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea," 81 J. Crim. L. & Criminology 191, 231-234 (1990).

* * *

The Second Circuit has relaxed the standard of conscious avoidance, intended as a "strictly limited exception" to the requirement of actual knowledge, Jewell, 532 F.2d at 700, to one of recklessness or even mere negligence. In this case it approved a conscious avoidance instruction that was neither factually warranted nor properly formulated. This error was compounded by the panel's statement that the faulty instruction is appropriate whenever "evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct." The panel's approach greatly reduces the government's burden to prove knowledge beyond a reasonable doubt and encroaches on the prerogatives of the legislature. This Court, which has not previously addressed conscious avoidance, should grant this writ to settle an important and frequently litigated question of federal law and to resolve the conflict between the Second and other circuits.

POINT II: DOUBLE JEOPARDY LAW BARRED PETITIONER'S SECOND TRIAL, SINCE THERE WAS NO "MANIFEST NECESSITY" FOR THE MISTRIAL DECLARATION.

Certiorari should also be granted because the Second Circuit's denial of petitioner's double jeopardy claim conflicts with applicable decisions of this Court.

If a trial court declares a mistrial without the defendant's consent, a retrial is barred on Double Jeopardy grounds unless there was "manifest necessity" for the mistrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). In deciding whether to declare a mistrial, a trial judge cannot slight a defendant's "valued right to have his trial completed by a particular tribunal," Wade v. Hunter, 336 U.S. 684 (1949); in a close case, doubts about whether a mistrial was properly granted are to be resolved in favor of barring retrial. Downum v. United States, 372 U.S. 734, 738 (1963).

A "genuinely deadlocked" jury may be discharged without implicating the Double Jeopardy clause, Arizona v. Washington, 434 U.S. 497, 509 (1978), and a trial judge's decision to declare a mistrial when he considers the jury deadlocked is properly accorded deference by a reviewing court. Ibid. Deference is accorded because the trial court is believed to be in the best position to weigh all the factors that must be considered in making the determination whether the jury will be able to reach a just verdict if it continues to deliberate. Id., n. 28.

On the other hand "[i]f the record reveals that the trial

judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by an appellate court disappears." Ibid. In Arizona v. Washington, 434 U.S. at 509, this Court explained the dangers being guarded against:

> On the one hand, if [the trial judge] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

In United States v. Jorn, 400 U.S. 470, 487 (1971), the plurality opinion declared that the trial judge had abused his discretion in discharging the jury: the court had acted precipitately, not giving due consideration to the possibility of alternatives to a mistrial, such as a continuance. In short, the trial court had made no effort to "exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial."

In petitioner's case, the absence of jury deadlock is evidenced by the fact that, after the 5:45 p.m. note, both the government and the defense requested that the jury be permitted to continue its deliberations. See Arizona v. Washington, 434 U.S. at 505 (prosecutor must "shoulder the burden of justifying the mistrial...[and] demonstrate 'manifest necessity' for any

mistrial declared over the objection of the defendant"). Although the panel opinion stated that there were three statements by the jury that it was "hopelessly deadlocked," that is a misstatement of the record. See p. 6-7, supra.

In seizing upon a jury note after only a few hours of deliberation as a springboard for declaration of a mistrial, the district court acted without the requisite sound basis for concluding that the jury was "hopelessly deadlocked" and thereby violated petitioner's "valuable right to have [her] trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. at 503. Certiorari should accordingly be granted because the Second Circuit has decided the question of whether the Double Jeopardy clause barred petitioner's retrial in a way that conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
January 17, 1992

Respectfully submitted,

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89-cr-795
Bartels

RKW

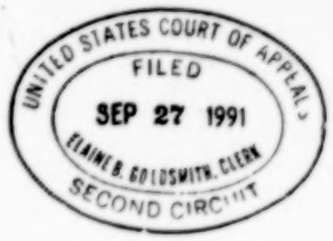
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty seventh day of September , one thousand nine hundred and ninety one .

Present:

Honorable J. Edward Lumbard,
Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Circuit Judges.



UNITED STATES OF AMERICA,
Appellee,

v.

ANA LENOR FEIJOO-TOMALA,
Defendant-Appellant.

O R D E R
91-1233

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Ana Lenora Feijoo-Tomala appeals from her conviction by a jury before Judge Bartels. Appellant argues that the district court abused its discretion by declaring a mistrial because of a hung jury at her first trial and that her second trial was thus barred on double jeopardy grounds.

We reject this claim. A trial judge may declare a mistrial in a criminal case without the consent of the defendant if he or she finds a "manifest necessity" to do so. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). A grant of a mistrial is entitled to the "highest degree of respect" and is not to be disturbed absent an abuse of discretion. Arizona v. Washington, 434 U.S. 497, 511 (1978); Hameed v. Jones, 750 F.2d 154, 161 (2d Cir. 1984).

A trial judge's belief that a jury is deadlocked is "the most common form of 'manifest necessity'" justifying a mistrial. Oregon v. Kennedy, 456 U.S. 667, 672 (1982) (hung jury the prime example of manifest necessity); Arizona v. Washington, 434 U.S. 497 (1978). Although Judge Bartels declared a mistrial after the jury had deliberated only three and one-half hours, a finding of manifest necessity is not a mechanical determination subject to mathematical limits. United States v. Klein, 582 F.2d 186, 193 (2d Cir. 1978). A judge may properly take other factors into account along with the length of deliberation, such as complexity of the issues involved. See Arnold v. McCarthy, 566 F.2d 1377,

1387 (9th Cir. 1978) (citations omitted). Where the issues are complex, an announcement of irreconcilable differences after brief deliberations may suggest that a jury has not fully analyzed the matter. Where the issues are simple and clear-cut, brief deliberations may reveal well-considered differences that cannot be resolved. Moreover, a jury's statement that it is unable to come to a verdict is the most crucial factor to be considered. United States v. Lorenzo, 570 F.2d 294, 299 (9th Cir. 1978). In the instant case, the court did not abuse its discretion in declaring a mistrial after giving an Allen charge twice and after the jury had announced three times that it was hopelessly deadlocked on what the court determined to be a rather simple criminal case. The second trial was thus not barred on double jeopardy grounds.

Appellant also claims that she was prevented from receiving a fair second trial because of the court's alleged bias against the defense and its interference with defense counsel's presentation. We disagree. We have consistently recognized that it is a trial court's responsibility to insure that evidence is presented to the jury in an understandable manner, and the court's role is "not restricted to that of a mere umpire or referee." United States v. Mazzilli, 848 F.2d 384 (2d Cir. 1988) (citing United States v. DiTommaso, 817 F.2d 201, 221 (2d Cir. 1987)). A new trial is thus warranted only when the judge's conduct denied the defendant a

fair trial. DiTomasso, 817 F.2d at 220. The evidentiary rulings cited by appellant and alleged limiting of defense questioning were well within the bounds of judicial discretion and did not deprive appellant of a fair trial.

Additionally, Feijoo-Tomala claims that the court erroneously disallowed defense expert testimony on Ecuadorian travel practices. We will overturn a decision regarding admittance of expert testimony only when the court's decision was "manifestly erroneous." United States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985); United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 111 S. Ct. 179 (1990). No such error occurred in this case.

Appellant's defense to the narcotics trafficking offense was that she unwittingly carried narcotics for a citizen of Ecuador who approached her at the airport and asked her to deliver the suitcase to a friend in the United States. Feijoo-Tomala sought to call an expert to testify that it was common for Ecuadorians to carry packages for each other to foreign countries, but the trial judge disallowed the testimony. This was not error. See United States v. Navarro-Varelas, 541 F.2d 1331, 1333-34 (9th Cir. 1976) (no abuse of discretion to exclude expert testimony that the practice of hiding narcotics in secret compartments in the luggage of unsuspecting travelers was a common scheme of drug smugglers), cert. denied, 429 U.S. 1045 (1977). We agree with the district

court that it is not clear what the testimony would have added other than to bolster marginally Feijoo-Tomala's testimony regarding her professed ignorance of the narcotics stash, if that. Appellant's view of the facts was that, at the airport in Ecuador and on her way back to the United States, she was approached by a complete stranger and agreed to deliver the suitcase for the stranger to a person in the United States. Feijoo-Tomala did not know this person and had only a purported address scribbled on a piece of paper that included no town. Appellant did not inquire as to how or where to deliver the suitcase, and the stranger disappeared moments after handing over the suitcase. Even as proffered, the expert testimony did not support that story. In sum, the district court's judgment that no expert was needed to explain the "cultural context" of Feijoo-Tomala's conduct at the Ecuadorian airport was not "manifestly erroneous."

Finally, Feijoo-Tomala faults the district court's jury instructions on two grounds. First, she contends that the instructions concerning credibility created the risk that the jury would use a "prejudicial standard" in evaluating her testimony. We disagree. In United States v. Matias, we made clear that a court's instruction regarding a defendant's credibility is "balanced" by using language which conveys the basic message that a defendant's testimony should be judged no differently than that of any other witness. United States v. Matias, 836 F.2d 744, 750

(2d Cir. 1988) (citations omitted). In the instant case, the district court repeatedly used such balanced language in its instructions regarding both the appellant's testimony and that of law enforcement officials. Therefore, the credibility instruction could not have prejudiced the jury.

Second, appellant contends that the district court erroneously instructed the jury on her conscious avoidance, pointing to the fact that the government offered no proof that Feijoo-Tomala purposely avoided learning of the hidden cocaine. The purpose of a conscious avoidance charge is to allow the jury "to impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps." United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986). Such a charge is appropriate when the evidence demonstrates that the circumstances would have alerted a reasonable person of the unlawful nature of his conduct. United States v. Mang Sum Wong, 884 F.2d 1537, 1541 (2d Cir. 1989) (quoting United States v. Guzman, 754 F.2d 482, 489 (2d Cir. 1985), cert. denied, 474 U.S. 1054 (1986)), cert. denied, 110 S. Ct. 1140 (1990).

Given appellant's view of the facts that included accepting a suitcase from a stranger to be brought to the United States without further intelligible instructions, the district court was more than justified in concluding that the conscious avoidance

charge was warranted.

Affirmed.

Hon. J. Edward Lumbard, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. Frank X. Altimari, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of October one thousand nine hundred and ninety one.

Present: Hon. J. EDWARD LUMBARD
RALPH K. WINTER
FRANK X. ALTIMARI

Circuit Judges,

UNITED STATES OF AMERICA,
APPELLEE,

v.

ANA LENOR FEIJOO TOMALA,
DEFENDANT-APPELLANT.

Docket No. 91-1233

A petition for a rehearing having been filed herein by Appellant, Ana Lenor Feijoo-Tomala.
Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk